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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No.

JAMES W. SOLOMON, Santa Cruz County
Chief Probation Officer, *Petitioner,*

vs.

BOB JOSEPH ENZENSPERGER, JR., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner, James W. Solomon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 29, 1974.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals, unreported, is appended hereto as "Appendix A". The opinion of the United States District Court for

the Northern District of California, likewise unreported, is appended hereto as "Appendix B". The opinion of the California Court of Appeal, originally reported, was ordered not to be published by the California Supreme Court. Accordingly, the now unreported opinion is appended hereto as "Appendix C".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed July 29, 1974. This petition was filed within 90 days of that date. The jurisdiction of this Court is involved under Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether search and seizure contentions may be raised by a state criminal defendant in a federal habeas corpus proceeding, where the state courts have previously adjudicated the same contention against him before trial and thereafter on direct appeal.

2. Whether a "protective sweep" of areas outside an arrestee's "wingspan" may be made, where the officer reasonably suspects that confederates of the arrestee, possibly armed, may be hiding in those areas.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Appellant Bob Joseph Enzensperger, Jr., was charged by complaint filed in Santa Cruz County Municipal Court with violations of California Health and Safety Code sections 11530 (possession of marijuana) and 11530.1 (cultivation of marijuana). A preliminary hearing was conducted, and testimony taken, on November 5, 1969 and December 3 and 16, 1969. On December 16, 1969, appellant was held to answer, the Municipal Court also suppressing some of the evidence against him.

The Santa Cruz County District Attorney filed an information charging Enzensperger with possession of marijuana only on December 22, 1969. He was arraigned on December 23, 1969, at which time the district attorney moved for a hearing *de novo* on the admissibility of the evidence surpressed by the Municipal Court, pursuant to California Penal Code section 1538.5(j).

Enzensperger moved to dismiss the information, pursuant to California Penal Code section 995, on December 24, 1969. The motion was denied on February 17, 1970.

On June 18, 1970, the Santa Cruz County Superior Court granted in part the motion of the People to reverse the Municipal Court's suppression order. Appellant waived his right to a jury trial, and submitted the matter on the preliminary hearing transcript. On July 16, 1970, the Superior Court found him guilty; he was admitted to probation for a period of five years

on specified terms and conditions on September 4, 1970.

Enzensperger appealed to the California Court of Appeal. That court affirmed the judgment on May 31, 1972. The California Supreme Court granted a hearing and retransferred the case to the Court of Appeal for reconsideration in light of *Dillon v. Superior Court,* 7 Cal.3d 305, 313-314, 102 Cal.Rptr. 161, 166 (1972). The California Court of Appeal, in a second opinion dated October 17, 1972, reaffirmed its prior holding. Amendments to the opinion were filed October 19 and 27, 1972. Enzensperger's petition for hearing was denied by the California Supreme Court on December 13, 1972; the California Reporter of Decisions was directed not to publish the opinion in the official appellate reports.

B. Proceedings in the Federal Courts

Enzensperger then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, on January 24, 1973. On April 26, 1973, the District Court filed a memorandum of decision, holding that certain evidence (but not all evidence) upon which the conviction rested should have been suppressed. The writ of habeas corpus was thus granted in part and denied in part.

Respondent appealed on May 10, 1973, from that part of the order granting the writ. The District Court stayed its order granting the writ of habeas corpus in part, pending determination of the appeal, on May 16, 1973. Thereafter, on May 21, 1973, En-

zensperger entered a cross-appeal from that part of the order denying the writ and was granted a certificate of probable cause by the District Court four days later.

On July 29, 1974, the Court of Appeals filed its opinion affirming and modifying the order of the District Court and remanding the matter for further proceedings.

C. Statement of the Facts

The District Court noted that "[E]xcept for minor details and differences in emphasis, the summary of facts contained in the opinion of the [California] Court of Appeal is not inconsistent with that contained in the petition." The District Court then presented a summary of that summary of facts; the latter summary was adopted by the Court of Appeals. With the exceptions noted below, that summary suffices here.

> "On the evening of September 30, 1969, Investigator Verbrugge of the Santa Cruz District Attorney's Office learned from one Elsberg, a state narcotics agent, that petitioner was a suspected source of marijuana plants. Elsberg had received his information from an informant who had been arrested shortly before in Richmond, California. Later that evening, Verbrugge and Elsberg met with other state agents, Richmond police officers, and the informant at a Santa Cruz restaurant to discuss the information. They decided to go to petitioner's Santa Cruz residence. The informant had indicated that there was a chance the petitioner might be armed. Headed by Verbrugge, a party of some twelve armed officers in plain

clothes drove to petitioner's house. Two agents, who had been instructed to talk with petitioner and attempt to buy marijuana from him, proceeded through the outer front door and then knocked on the inner front door, awakening petitioner's wife. She told them that her husband was away and gave them a telephone number to call. The agents left, called the number and talked to a man who said that his plants were too small at that time to be sold.

The two agents then rejoined the party of officers. While they were discussing the matter, they saw a car arrive at petitioner's house and its two occupants go into the house.

A little after midnight, the officers decided to 'just go take the place.' Verbrugge, followed by Elsberg and a police sergeant named Marston, went through the outer front door without knocking and ascended the stairs within the enclosed courtyard to the inner front door. By looking through a large glass window next to the door, Verbrugge saw petitioner and two women seated at a kitchen table. Verbrugge knocked on the door and petitioner opened it. Verbrugge identified himself and asked if he could speak with petitioner, who had admitted his identity. At petitioner's invitation, the three agents entered the kitchen and approached the table, at which time Verbrugge observed marijuana debris scattered on the table. When petitioner asked if Verbrugge had a search warrant, the reply was 'no'. Verbrugge then arrested the three persons in the house for possession of marijuana. After the arrest, the other officers who had been waiting outside—eight in number—came into the house.

Petitioner, who was unarmed, began to walk away from the officers, refused to sit down, and swore at them. He was thereupon handcuffed. Verbrugge instructed Marston to pick up the evidence on the table. Verbrugge then went through the living room and downstairs to a lower level bedroom 'to see if there was anybody present.' Turn-on the light, he saw an open double door closet across which a sheet was hanging. Over the top of the sheet, which was about at chin level, he saw four hanging marijuana plants. He pulled the sheet aside to get a better view; the marijuana plants appeared to be fresh and drying.

Verbrugge then went to the master bedroom; in the adjacent bathroom he looked into a four by five foot cabinet in which he found a shoe box which contained marijuana."[1]

---

[1]We should have no hesitation in adopting the District Court's summary *verbatim*, were it not for the fact that it omits certain other crucial facts which the California Court of Appeal expressly cited in support of its judgment. They comprise the reasons articulated for the arresting officer's fear that confederates, possibly armed, were hidden elsewhere in the house.

The California Court of Appeal, at pages 24 and 25 of its opinion, enumerated these facts as follows:

"1. In addition to his information that narcotics had been obtained from and were at the residence, he had information from fellow officers that someone might be armed.

"2. When arrested, Bob moved as if to walk away from Verbrugge and resist arrest. He would not sit down when asked to do so, swore at the officers and had to be handcuffed.

"3. After arresting defendants and prior to inspecting the premises, Verbrugge specifically asked whether there was anyone else in the house. No one responded.

"4. Verbrugge had no way of knowing whether there was anyone else in the residence. Before going to the front door he knew at least one female and the two persons who drove up in the car were there. He did not know whether the three persons he subsequently arrested were those same persons."

The Statement of Facts by the Court of Appeals neglects one other crucial fact. The marijuana found in the shoebox was ordered

REASONS FOR GRANTING THE WRIT

The present case most graphically illustrates the inequities which may result when state criminal defendants are allowed to press search and seizure claims in federal habeas corpus actions, *Kaufman v. United States*, 394 U.S. 217 (1969), long after the state courts have given those same claims exhaustive factual and legal consideration, and have determined them adversely to the defendant. Only by neglecting the full factual record developed in the California Court of Appeal could both the Court of Appeals and the District Court conclude that the evidence therein was "clearly insufficient to support a reasonable belief" that other, possibly armed, culprits were present in the house, thus necessitating a "protective sweep" designed to ensure the arresting officers' safety. That factual record, as developed in the state court, was presumed correct. Title 28, United States Code section 2254(d). Failure to consider it in its entirety in the federal habeas corpus proceeding not only precluded accurate adjudication of the actual search and seizure claim, but also rendered futile the state court's thorough analysis. Such a result does not comport with any rational notion of either finality of judgments or state-federal judicial relationships. Such a result necessitates an expanded willingness by this Court to act as "watchdog" over

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suppressed by the Municipal Court; this order was never challenged, with the result that the only evidentiary result of Verbrugge's walk-through consisted of the plants hanging in the closet. The California Court of Appeal noted this on page 22 of its opinion, now appended hereto as "Appendix C".

lower federal courts in §2254 proceedings, lest *Kaufman* promote not only bad law, but cynical law as well. Yet, assumption of that role by this Court must inevitably deny other, primary litigants before it of "prompt availability and mature reflection." *Schneckloth v. Bustamonte*, 412 U.S. 218, 261 (1973) (Powell, J., concurring). Thus, the instant case is a compelling argument for adoption of the most equitable result of all—the overruling of *Kaufman*.

The instant case also presents the issue of whether a "protective sweep" search of a premises may be undertaken incident to a lawful arrest, where officers reasonably suspect that confederates of the arrestee lurk beyond his "wingspan". The rule of *Chimel v. California*, 395 U.S. 752 (1969), which has at its core a concern for the arresting officer's safety, has no violence done it by adoption of this modification.

ARGUMENT

I

THIS COURT SHOULD RECONSIDER, AND THEREAFTER OVERRULE, ITS PREVIOUS DECISION IN KAUFMAN v. UNITED STATES, 394 U.S. 217 (1969).

Criminal procedure cases which begin as relatively simple factual and legal propositions may, if redetermined by a sufficient number of courts, undergo a metamorphosis; what is heard by a supreme appellate tribunal, such as this one, by that time may not closely resemble the case originally brought. *See* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785,

789-791 (1970). It is the rare case which assigns that metamorphosis, both because it has occurred and because it has been allowed to occur, as the reason for exercise of this Court's certiorari jurisdiction. Yet this is no ordinary cause. Rather, it is evidence, in microcosm, of a breakdown in our federal system of court relationships. It is a concrete condemnation of the previous decision by this Court which allowed it to happen.

The simple problem is that presumptively correct factual determinations by California courts have been ignored by federal tribunals. That a prior decision by this Court makes that ignoring process all too likely is the underlying cause which raises the problem from the inequitable to the intolerable. Certiorari should be available both to restore the instant case to its true factual and legal posture, and to ensure that other cases like it do not hereafter arise.

The California Court of Appeal evaluated the "protective sweep" undertaken by agent Verbrugge in terms of the applicable California standard:

> ". . . in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or 'hunches', but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words he must be able to point to specific and articulable facts from which he concluded that his action was necessary."

Dillon v. Superior Court, 7 Cal.3d 305, 312-313, 102 Cal.Rptr. 161, 166 (1972); *People v. Block*, 6 Cal.3d

239, 244, 103 Cal.Rptr. 281, 283 (1971). It noted that the same test had been applied by the trial court. There, the parties had submitted briefs considering the correctness of the Municipal Court's suppression of all evidence save the marijuana on the kitchen table. Enzensperger in his brief noted that agent Verbrugge had testified in the preliminary hearing to a concern that armed confederates were present elsewhere in the house; he contended that no facts existed which would lead a reasonable man to believe the "protective sweep" was necessary. The district attorney cited the following facts: (1) information that someone might be armed; (2) an inability to account for all persons seen to enter and leave the residence that night; (3) Enzensperger's attempts to either frustrate or publicize the arrests; (4) the refusal of the arrestees to answer whether anyone else was present.[2] The trial court, and thereafter the California Court of Appeal, found these facts sufficient to legitimize agent Verbrugge's "sweep".

Events began to degenerate into chaos when Enzensperger sought a petition of habeas corpus in the District Court. That tribunal remarked: "[E]xcept for minor details and differences in emphasis, the summary of facts contained in the opinion of the Court of Appeal is not inconsistent with that contained in the petition." The District Court then found the California Court of Appeal conclusion that "ar-

[2]The transcript of the preliminary hearing, which was lodged with the District Court and thereafter with the Court of Appeals, also reveals that agent Verbrugge had been unable to determine the gender of the two individuals who entered the house prior to the arrest. Had they been either two women or two men, there would definitely have been a person unaccounted for in the house.

ticulable circumstances" exisited rested upon *only one* circumstance—the information that someone might be armed. Circumstances (2), (3), and (4), listed above, were reconstructed and analyzed in their altered form. The fact that officers "had no way of knowing whether there was anyone else in the residence" becomes the fact they "were specifically aware of the presence of only three persons." Given this initial misinterpretation of the state court finding, the rest of the circumstances may be explained away as innocuous, and the District Court so explained them. Thus, for example, Enzensperger's cursing is a possible warning gesture if police cannot otherwise account for all persons in the house. It is of no import, save as a gesture of frustration, if all other persons can be accounted for. The California Court of Appeal, finding that not all other persons could be accounted for, accorded the cursing significance as a warning. The District Court (and thereafter the Court of Appeals) ignored the finding, and thus accorded the gesture no significance.

In the Court of Appeals, it was in effect held that such a "protective sweep" is permitted if officers have a reasonable belief in the actual presence of confederates. *United States v. Gamble,* 473 F.2d 1274 (7th Cir. 1973). The legal standard by which the Court of Appeals evaluated "protective sweep" searches is, in other words, the same as that applied by the California Court of Appeal. One might reasonably expect, therefore, that the Court of Appeals would reach the same result as had the California courts, as the facts considered were identical. However, such was not the case.

The Court of Appeals was even less charitable to the factfinding process of the California Court of Appeal. It reiterated the District Court's misinterpretation as to the number of persons accounted for, ignored the information that someone was armed, and lumped the other circumstances under the general heading of "no facts which would lead to a contrary conclusion were ever articulated." The Court of Appeals concluded that the evidence was "clearly insufficient" to support a reasonable belief in the presence of other persons.

It might be self-satisfying to draw ourselves up to our full height, and loudly berate the District Court and Court of Appeals for the liberties they took with the state court factfinding process. In the last analysis, however, both courts are relatively blameless—their role was determined by those initially innocent events which permitted respondent Enzensperger to file his habeas corpus petition in federal court in the first place. Bluntly said, the legal process villain of the piece is the rule enunciated by this Court in *Kaufman v. United States, supra.*

The dubiousness of the historical and social bases upon which that rule was announced by its authors to rest, and the enormous costs it exacts, have been cogently explored. *Schneckloth v. Bustamonte, supra,* 412 U.S. at 250-275 (Powell, J., concurring). In our opinion, the instant case demonstrates both that the costs articulated therein are real ones, and that an additional serious problem with the *Kaufman* rule exists.

For example, Mr. Justice Powell argued that by the time a search and seizure claim is heard in a

federal habeas corpus action, tiers of state courts will have first considered it; the presumption ought to be that those courts have considered it correctly. *Schneckloth v. Bustamonte, supra,* 412 U.S. at 259. In the instant case, that presumption ought be more compelling, since: (1) both state and federal courts have applied the same legal standard; (2) the only difference is as to the underlying facts, determination of which by the state courts is presumptively correct under the Habeas Corpus Act of 1967. Mr. Justice Powell also adverted to the danger that a long delay between the search and final adjudication would frustrate any deterrent effect on police conduct and any rehabilitative force of the criminal judgment. *Id.* at 262. The search occurred on September 30, 1969; Enzensperger was admitted to a term of probation to run from September 4, 1970 to September 4, 1975. It does not seem alarmist to predict that the true rehabilitative aspects of that probation will begin to operate, if at all, only in the twilight of the period. Similarly, we should be surprised to find that agent Verbrugge's memory of the events are now clear. (Any subsequent retrial in the state courts, such as had been ordered by the Court of Appeals, will be the less reliable for that same reason.) Finally, Mr. Justice Powell spoke of the "humiliation" felt by state courts, whose very functioning seems denigrated. *Id.* at 260-261.

We think the "humiliation" is especially painful here. Not only has the California Court of Appeal been denigrated in the sphere of factual findings, about which it is presumptively correct, Title 28, United States Code Section 2254(d), but its exhaus-

tive efforts have been trod upon by less complete ones.[3]

Additionally, this case presents an inequity not discussed by Mr. Justice Powell. He noted that search and seizure cases heard in federal habeas corpus proceedings most often exist in a legal twilight, wherein complexity is commonplace and predictability of decision is not. *Id.* at 269-270. The instant case implies a corollary to that observation—the same cases may often exist in a *factual* twilight, where subtle shifts in emphasis and coloring will be dispositive. One factual alteration, as to the number of people accounted for, and its significance, has led to opposite results in the state and federal courts. Federalism, a fragile concept, needs no such unnecessary tensions.

There is no question but that Enzensperger had a full and fair hearing on his contention in the state courts. California, correspondingly, has had less than a fair hearing in the federal courts, due to the lack of respect accorded the factual determinations of its courts. When such a case as this arises, even *Kaufman,* considered in the light of Title 28, United States Code section 2254(d), would seem to require an increased willingness on the part of this Court to correct the factual liberties taken by lower federal courts. Cf. *Younger v. Harris,* 401 U.S. 37 (1971). We

[3]Another of the costs enumerated by Mr. Justice Powell was that of the overextension of scarce federal judicial resources, an overextension which ". . . jeopardizes the care and quality essential to fair adjudication." *Id.* at 261. The scope and depth of the federal analysis here, when compared with the efforts of Mr. Justice Sims, suggests an overextension, with its necessary implications, has occurred.

recognize the possibility that increased "backstopping" by this Court will overextend its own scarce judicial resources, to the exclusion of otherwise deserving litigation. The obvious solution is the one we advocate—the removal of the federal habeas corpus proceeding as an arena in which state criminal defendants may bring search and seizure claims.

II

PROTECTIVE SWEEPS OF AREAS BEYOND THE IMMEDIATE REACH OF AN ARRESTEE MAY BE MADE INCIDENT TO A LAWFUL ARREST IF THE OFFICER REASONABLY BELIEVES CONFEDERATES ARE LOCATED IN THOSE AREAS.

If the merits of this case be considered, we urge this Court to first modify its prior ruling in *Chimel v. California,* 395 U.S. 752 (1969), to permit "protective sweeps" incident to arrest where the officer reasonably believes other persons are present who might destroy evidence or frustrate the arrest. Thereafter, we urge a finding that the "protective sweep" herein was permissible. If agent Verbrugge thus were properly in the bedroom, the marijuana plants, in plain view, were properly seized. *Harris v. United States,* 390 U.S. 234 (1968).

"Protective sweep" searches have found scattered approval in the law, *United States v. Blake,* 484 F.2d 50, 56-57 (8th Cir. 1973); *United States v. Looney,* 481 F.2d 31, 32-33 (5th Cir. 1973); *United States v. Gamble, supra; United States v. Briddle,* 436 F.2d 4, 7 (8th Cir. 1970) *cert. denied,* 401 U.S. 921 ; *United States v. Broomfield,* 336 F. Supp. 179, 185 (E.D. Mich.

1972); *People v. Block, supra; cf. United States v. Manarite,* 448 F.2d 583, 593 (2d Cir. 1971); *compare Dillon v. Superior Court, supra.* More importantly, the concept does no violence to the purposes of *Chimel.* The first of those is a concern for both the officer's safety and the successful completion of the arrest. *Chimel v. California, supra,* 395 U.S. at 763. The other is a concern lest searches incident to arrest become general rummaging expeditions. *Id.* at 767. That danger is negated if the scope of the sweep is permitted only in those areas where a confederate might hide (closets, e.g.) and not in those where he might not (shoe boxes, e.g.). Indeed, the result of the trial court's original suppression motion ruling was exactly along those lines. *See* fn. 1, *ante.*

We might also add that the deterrent purpose of the exclusionary rule, *United States v. Calandra,* 414 U.S. 338, 347-348 (1973), is not served by its application to forbid protective sweeps based on reasonable belief. Where the officer reasonably believes, as here, that his life may be endangered, he will *always* make the sweep. His life, and the continuation thereof, mean more to him than any after-the-fact legal debate as to the admissibility of evidence of contraband found during the sweep.

We finally request this Court reverse the Court of Appeals' determination that the instant case was not one where a reasonable belief in the presence of armed confederates had been demonstrated. As previously noted, the Court of Appeals' determination followed from a misinterpretation of the facts found in the state courts. If the true facts be considered

here, *see* Title 28, United State Code §2254(d), they should be found sufficient to justify the sweep. *Compare United States v. Looney, supra* (officer's unfamiliarity with rural house, heinous crime, defendant's propensity to use confederates, lateness of hour); *United States v. Briddle, supra* (". . . conceded right to conduct a quick and cursory viewing . . . for the presence of other persons who might present a security risk.")

CONCLUSION

We respectfully request this Court to grant a writ of certiorari and reverse the decision of the Court of Appeals.

Dated: October 2, 1974

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(Appendices Follow)

Appendix A

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

Bob Joseph Enzensperger, Jr., Petitioner-Appellee, vs. James W. Solomon, Respondent-Appellant.	No. 73-2407
Bob Joseph Enzensperger, Jr., Petitioner-Appellant, vs. James W. Solomon, Respondent-Appellee.	No. 73-2383

[July 29, 1974]

Appeal for the United States District Court
for the Northern District of California

Before: ELY and WRIGHT, Circuit Judges,
McGOVERN,* District Judge.

THIS MATTER comes before us upon Respondent's Appeal and Petitioner's cross-appeal from a judgment which granted in part and denied in part defendant Enzensperger's petition for a Writ of Habeas Corpus following his conviction and sentence in a

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

California State trial court upon a charge of possession of marijuana.

Petitioner satisfactorily exhausted his state court remedies within the meaning of 28 U.S.C. §2254(b) and the United States District Court properly determined that an evidentiary hearing upon the habeas corpus application was not required because no factual dispute existed as to petitioner's claim.

A statement of the facts is helpful to an understanding of the claims and is excerpted here from the Memorandum Decision of the United States District Court:

> "On the evening of September 30, 1969, Investigator Verbrugge of the Santa Cruz District Attorney's Office learned from one Elsberg, a state narcotics agent, that petitioner was a suspected source of marijuana plants. Elsberg had received his information from an informant who had been arrested shortly before in Richmond, California. Later that evening, Verbrugge and Elsberg met with other state agents, Richmond police officers, and the informant at a Santa Cruz restaurant to discuss the information. They decided to go to petitioner's Santa Cruz residence. The informant had indicated that there was a chance that petitioner might be armed. Headed by Verbrugge, a party of some twelve armed officers in plain clothes drove to petitioner's house. Two state agents, who had been instructed to talk with petitioner and attempt to buy marijuana from him, proceeded through the outer front door and then knocked on the inner front door, awakening petitioner's wife. She told them that her husband was away and gave them a telephone number to call. The agents left, called the number and talked to

a man who said that his plants were too small at that time to be sold.

The two agents then rejoined the party of officers. While they were discussing the matter, they saw a car arrive at petitioner's house and its two occupants go into the house.

A little after midnight, the officers decided to 'just go take the place.' Verbrugge, followed by Elsberg and a police sergeant named Marston, went through the outer front door without knocking and ascended the stairs within the enclosed courtyard to the inner front door. By looking through a large glass window next to the door, Verbrugge saw petitioner and two women seated at a kitchen table. Verbrugge knocked on the door and petitioner opened it. Verbrugge identified himself and asked is he could speak with petitioner, who had admitted his identity. At petitioner's invitation, the three agents entered the kitchen and approached the table, at which time Verbrugge observed marijuana debris scattered on the table. When petitioner asked if Verbrugge had a search warrant, the reply was 'no'. Verbrugge then arrested the three persons in the house for possession of marijuana. After the arrest, the other officers who had been waiting outside—eight in number—came into the house.

Petitioner, wha was unarmed, began to walk away from the officers, refused to sit down, and swore at them. He was thereupon handcuffed. Verbrugge instructed Marston to pick up the evidence on the table. Verbrugge then went through the living room and downstairs to a lower level bedroom 'to see if there was anybody present.' Turning on the light, he saw an open double door closet across

> which a sheet was hanging. Over the top of the sheet, which was about at chin level, he saw four hanging marijuana plans. He pulled the sheet aside to get a better view; the marijuana plants appeared to be fresh and drying.
>
> Verbrugge then went to the master bedroom; in the adjacent bathroom he looked into a four by five foot cabinet in which he found a shoe box which contained marijuana."

On the basis of those facts, admitted into evidence, the state trial court found the defendant guilty as charged and entered a judgment accordingly. The United States District Court concurred in the conclusion of the state courts that under the existing facts, the entries of the agents and officers through the unlocked door of the outer fence-like structure appeared to be the normal method of gaining access to the residential main entrance itself and were not therefore constitutionally infirm. We agree.

We also concur in the conclusion of the two trial courts that the marijuana debris which Inspector Verbrugge thereafter observed in plain view on the kitchen table constituted probable cause to arrest the petitioner in spite of the modest quantity involved. See *People v. Pohle,* 20 Cal. App. 3d 78, 97 Cal. Rptr. 364 (1971).

However, the state trial court, over objections, admitted into evidence the marijuana plants which were found hanging in the closet and in the shoebox contained within the cabinet. The United States District Court found that such evidence was admitted contrary

to the constitutional principles enunciated in *Chimel v. California,* 395 U.S. 752 (1969) and therefore granted the petition for writ of habeas corpus insofar as it related to the suppression of evidence found in the house after petitioner's arrest. We affirm.

In *Chimel,* the Court held that a warrantless search incident to an arrest could not be made beyond "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." And in *United States v. Gamble,* 473 F.2d 1274 (7th Cir., 1973), it was appropriately held that a "protective sweep" to ensure the safety of officers against attack from rooms beyond the site of the arrest violates *Chimel* in the "absence of a reasonable belief, by such officers that other suspects are actually in the area beyond the reach of the arrested".

Here the evidence was clearly insufficient to support a reasonable belef that other suspects were actually in the area. All persons known to be in the residence were accounted for and no facts which would lead to a contrary conclusion were ever articulated. That being so, the sweeping search of the premises beyond the kitchen area violated the rule of *Chimel.*

The District Court's grant of the writ of habeas corpus is affirmed insofar as it relates to the suppression of the unconstitutionally seized evidence, but modified insofar as the matter was remanded to the state trial court in which petitioner was sentenced for purposes of *reconsideration and redetermination of his*

sentence. The introduction of illegally seized evidence invalidates the conviction as well as the sentence and the petitioner is, therefore, entitled to a new trial. The petition should be held in abeyance by the District Court for a period not exceeding sixty days, in order to allow the California authorities an opportunity to retry the petitioner, should they choose to do so, without the introduction of the impermissible evidence. Should California choose not to retry him, the writ should issue.

Affirmed in part, modified in part, and remanded with instructions.

Appendix B

In the United States District Court
for the Northern District of California

Civil No. 73-0145 GBH

Bob Joseph Enzensperger, Jr.,
Petitioner,
vs.
James W. Solomon, Santa Cruz County Chief Probation Officer,
Respondent.

[Filed Apr. 26, 1973]

MEMORANDUM OF DECISION

Petitioner was charged in a state indictment in two counts: violation of California Health & Safety Code §11530 (possession of marijuana) and violation of §11530.1 (cultivation of marijuana). Before trial, the magistrate dismissed the cultivation count. Petitioner was thereafter found guilty of the possession count pursuant to stipulation that the matter submitted on the transcript of the preliminary examination after the petitioner had unsuccessfully moved to dismiss under California Penal Code §995 and was similarly unsuccessful in resisting the State's motion under California Penal Code §1538.5(j). Petitioner was sentenced to a period of five years' probation upon certain conditions.

Petitioner is before this court pursuant to the filing of his petition for writ of habeas corpus on January 24, 1973, challenging his conviction. He has satisfactorily exhausted his state court remedies within the meaning of 28 U.S.C. §2254(b) by appealing without success to the pertinent California appellate courts on the constitutional issues raised herein. *Schiers v. California,* 333 F.2d 173, 174 (9th Cir. 1964). He is presently on probation in the constructive custody of respondent.

The matter is before this court on the petition, respondent's return thereto, the Clerk's Transcript on Appeal from Judgment of Conviction, the transcripts of the preliminary examination, and the unpublished opinion of the California Court of Appeal, First Appellate District.

A careful and independent review of the evidence adduced at petitioner's preliminary examination discloses that there is no factual dispute which would require this court to conduct an evidentiary hearing. Except for minor details and differences in emphasis, the summary of facts contained in the opinion of the Court of Appeal is not inconsistent with that contained in the petition. The questions presented by the petition relate to errors of constitutional magnitude allegedly made by the California courts.

Briefly summarized, the pertinent facts are as follows: On the evening of September 30, 1969, Investigator Verbrugge of the Santa Cruz District Attorney's Office learned from one Elsberg, a state narcotics agent, that petitioner was a suspected source of

marijuana plants. Elsberg had received his information from an informant who had been arrested shortly before in Richmond, California. Later that evening, Verbrugge and Elsberg met with other state agents, Richmond police officers, and the informant at a Santa Cruz restaurant to discuss the information. They decided to go to petitioner's Santa Cruz residence. The informant had indicated that there was a chance that petitioner might be armed.

Headed by Verbrugge, a party of some twelve armed officers in plain clothes drove to petitioner's house. Two state agents, who had been instructed to talk with petitioner and attempt to buy marijuana from him, proceeded through the outer front door and then knock on the inner front door, awakening petitioner's wife. She told them that her husband was away and gave them a telephone number to call. The agents left, called the number and talked to a man who said that his plants were too small at that time to be sold.

The two agents then rejoined the party of officers. While they were discussing the matter, they saw a car arrive at petitioner's house and its two occupants go into the house.

A little after midnight, the officers decided to "just go take the place." Verbrugge, followed by Elsberg and a police sergeant named Marston, went through the outer front door without knocking and ascended the stairs within the enclosed courtyard to the inner front door. By looking through a large glass window next to the door, Verbrugge saw petitioner and two women seated at a kitchen table. Verbrugge knocked

on the door and petitioner opened it. Verbrugge identified himself and asked if he could speak with petitioner, who had admitted his identity. At petitioner's invitation, the three agents entered the kitchen and approached the table, at which time Verbrugge observed marijuana debris scattered on the table. When petitioner asked if Verbrugge had a search warrant, the reply was "no." Verbrugge then arrested the three persons in the house for possession of marijuana. After the arrest, the other officers who had been waiting outside—eight in number—came into the house.

Petitioner, who was unarmed, began to walk away from the officers, refused to sit down, and swore at them. He was thereupon handcuffed. Verbrugge instructed Marston to pick up the evidence on the table. Verbrugge then went through the living room and downstairs to a lower level bedroom "to see if there was anybody present." Turning on the light, he saw an open double door closet across which a sheet was hanging. Over the top of the sheet, which was about at chin level, he saw four hanging marijuana plants. He pulled the sheet aside to get a better view; the marijuana plants appeared to be fresh and drying.

Verbrugge then went to the master bedroom; in the adjacent bathroom he looked into a four by five foot cabinet in which he found a shoe box which contained marijuana. He called Marston to the bedroom and Marston discovered a two-pound coffee can with marijuana inside on top of a dresser.

Based on the above stated facts, petitioner makes several contentions, each of which will be discussed below.

1. *Did the entrance of the agents through the outer front door of petitioner's house without their knocking or securing permission therefor violate petitioner's Fourth Amendment rights?*

Essential to an understanding of this issue is a description of the design of petitioner's house. From the photographs introduced and the testimony given at the preliminary examination, the house may be described as fronted by a roofless atrium (courtyard). The remainder of the house is in a "U" shape around this courtyard. Thus, the dwelling area surrounds the courtyard on three sides, and a wall with a door close the "U" at the front. This connecting wall is built of the same siding as the house and is the same height as the door frame. The ends of the "U," however, have wings which rise to about twice the height of the wall. The door is in the center of the "U" at the front of the courtyard, is paneled with a lever-type latch, and front door is the stairway which leads to the inner front door that provides access to the living room. This inner front door has no doorbell.

As noted above, when the two agents made their first entry, they came into the courtyard through the outer front door without knocking or announcing their presence. Similarly, Verbrugge, Elsberg and Marston made their later entry through the outer front door without knocking or announcing their presence.

Petitioner argues that such entries invaded the privacy of his residence contrary to law as expressed in California Penal Code §844 and its federal counterpart, 18 U.S.C. §3109, and that the subsequent con-

sent to enter was therefore inaffective. Thus it would follow that all the evidence seized in petitioner's house was tainted and hence inadmissible.

At the conclusion of the preliminary hearing, the magistrate simply ruled that there had been no violation of §844 because the officers had been invited in. He made no specific findings as to whether the outer front door was or was not the main door. In overruling the magistrate's ruling which suppressed as evidence the hanging marijuana plants found in the bedroom, the trial court did not render a written opinion nor did it make findings of fact or conclusions of law. On appeal, the California Court of Appeal approached the question on the basis that rulings of the magistrate and the trial judge "of necessity" upheld the entry of Verbrugge and the other officers. The court of Appeal stated that "No error is found in the implied findings that the officers properly obtained admission to the kitchen area in the course of their investigation."

Under these circumstances, there is no determination evidenced by a "written finding, written opinion, or other reliable and adequate written indicia" which can be presumed to be correct under 28 U.S.C. §2254(d). *Hill v. Nelson,* 466 F.2d 1346, 1348 (9th Cir. 1972). There was, however, a full and fair hearing on the issue and the material facts were adequately developed thereat. Since no factual dispute exists as to petitioner's claim, a further evidentiary hearing is not required and this court can make its own determi-

nation on the legality of the entry into petitioner's house. *Cf. Thomas v. Craven,* No. 72-2028 Amended Opinion (9th Cir. March 2, 1973).

The question here is a close one. On the one hand, Verbrugge regarded the outer front door as a "gate" or "fenced-type" door. He thought that the wall into which the door was placed was merely a fence which united the two wings of the "U." He failed to see the doorbell but explained that it was dark at the time. The courtyard, however, was lighted.

On the other hand, the designer of the house testified that the front wall was an extension of the bedroom walls within the wings and that the outer front door was actually the main entrance.

The test which should be applied is that of the reasonable expectation of a third party, not the subjective outlook of the designer. The inquiry, then, is what would appear to be the usual approach of those visiting the petitioner when they wished to gain access to the main entrance of his house? Certainly the answer might vary depending on the time of day, the condition of the weather, the presence of lighting, and so on. On the facts presented here, the unlocked door in the fence-like structure on a dark night would seem to be the normal means of access to the main entrance itself. Petitioner has not established that the outer front door fronting the courtyard was subject to the requirements of demand and explanation. Consequently, the entries of the agents and officers through such door were not constitutionally infirm.

2. *Did Verbrugge's observation of the marijuana debris in the kitchen table provide probable cause for the arrest of petitioner?*

Petitioner's next argument is that the marijuana debris which Verbrugge observed in plain view on the kitchen table did not constitute probable cause to arrest him.

Such probable cause cannot be founded upon the information supplied by the informant who gave the initial tip which led Verbrugge and the other agents to petitioner's house. No evidence was ever presented showing the informant's reliability, nor did Verbrugge thereafter acquire such additional information as would corroborate the informant's report. Probable cause, then, must be founded solely on Verbrugge's observations in the living room and kitchen area.

Verbrugge's testimony is somewhat sparse. He saw "debris all over the table in different spots . . . and some cigarette papers." The debris appeared to him to be "green manicured marijuana." He also saw some marijuana seeds, but could not recall seeing twigs. No testimony was elicited from him concerning his prior knowledge of, or experience in identifying, marijuana.

The debris in question was subsequently analyzed and found to contain approximatly .1 grams of marijuana. This small amount, petitioner urges, does not justify an inference of present use or possession of a useable quantity of marijuana. Petitioner's argument here rests chiefly on *People v. Fein,* 4 C.3d 747, 484 P.2d 583, 94 Cal.Rptr. 607 (1971).

In *Fein,* as here, the information gained from an informant was sufficient to justify police investigation of the matter, but was not deemed sufficient without more to constitute probable cause for arrest. In *Fein,* too, the informant's reliability was unproven and the attempted corroboration thereof inadequate. Finally, petitioner compares the "two burnt marijuana seeds" observed by the police in *Fein* with the marijuana debris observed here by Verbrugge.

In *Fein,* the California Supreme Court rejected the argument that the observation of the burnt seeds (which were not produced for trial because they were so badly charred that they turned to ash when placed inside an envelope) provided sufficient cause for arrest. This conclusion was based on prior holdings that "evidence of useless traces or residue of narcotic substances do not constitute sufficient evidence to sustain a conviction for possession of narcotics." *Id.* at 754.

Here, however, the debris, although admittedly modest in amount was nonetheless more than a "useless trace or residue." The chemist for the state bureau of narcotics enforcement testified that the debris contained .1 grams of marijuana, that he considered the average marijuana cigarette to contain .3 grams of marijuana gross weight, and that the debris given to him was a useable quantity because it was one-third of the amount used in an average marijuana cigarette. He admitted that he had not seen samples sold in such small quantities, but the actual material he examined would have been useable in a cigarette or pipe.

The decisive factor here is that the debris was sufficient to be used to create a narcotic effect and was ob-

served by Verbrugge. *Cf. People v. Pohle,* 20 Cal.App.3d 78, 81-82, 97 Cal.Rptr. 364 (1971). Accordingly, there was probable cause to arrest petitioner.

3. *Did the warrantless search of petitioner's house incidental to arrest exceed the scope of permissible search under Chimel v. California?*

Verbrugge testified that he searched areas of petitioner's house beyond the latter's immediate reach "to see if there were any other occupants . . . they might be responsible for some of the marijuana. Also they might attempt to free the prisoners from us as we went out." It was in the course of his search that Verbrugge found the marijuana plants hanging in the closet and the shoebox containing marijuana in the bedroom. (The marijuana in the coffee can which Marston found was not introduced by the prosecution.)

When petitioner asserted the invalidity of the search evidence at the preliminary examination, the magistrate granted the motion to suppress the marijuana found in the bedrooms. Subsequently, however, this decision was reversed by the trial court pursuant to motion under California Penal Code §1538.5(j) as to the marijuana plants found hanging in the closet. Thus, the only contraband which is presently at issue is the marijuana plants found hanging in the closet.

Petitioner places his main reliance on *Chimel v. California,* 395 U.S. 752 (1969), wherein the Supreme Court reformulated the boundaries of a warrantless search incident to arrest. The Court held that a warrantless search incident to arrest cannot be made be-

yond 'the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

It is unquestionable that Verbrugge's exploration of petitioner's house following his arrest was beyond his person and the area within his immediate control. Verbrugge's ostensible purpose was to see if there were any other occupants in the house. He did not testify that he was concerned about the possible destruction of evidence.

The California Supreme Court has recently considered the reach of *Chimel* under circumstances analogous to those presented here. In *People v. Block,* 6 C.3d 239, 499 P.2d 961, 103 Cal.Rptr. 281 (1971), the search of a second floor of a residence was upheld because the officers there were merely attempting to round up all possible participants who might have been hiding during an alleged "pot party." In *People v. Dillon,* 7 C.3d 305, 497 P.2d 505, 102 Cal.Rptr. 161 (1972), the search of a house was held constitutionally invalid where the police had no specific or articulable information that any suspects were in the house at the time of arrest.

In its opinion here, the Court of Appeal distinguished *Dillon* and concluded that "there is evidence of articulable circumstances" which sustained the search. The "articulable circumstances" referred to, however, were that Verbrugge had been told that someone might be armed. The Court of Appeal relied upon the following principle: "The protection of evidence, pending obtaining of a search warrant, and

the safety of the officers dictates that an inspection of the premises used for the criminal offense is reasonable and should not be prohibited on constitutional principles." (Opinion at 30). Be that as it may, it is not what *Chimel* teaches.

The State advances these additional facts to uphold the search: petitioner moved as if to walk away when arrested, swore at Verbrugge, and refused to reply to Verbrugge's question as to whether there were any other persons in the house. In rebuttal, petitioner points out that Verbrugge's information from an informant whose reliability has not been proven to the effect that someone might be armed is insufficient to come within the "exigent circumstances" exception to the requirement for a search warrant. Moreover, petitioner was incapable of resistance, having been handcuffed and seated when Verbrugge began his search. *Cf. United States v. Patterson,* 447 F.2d 424 (10th Cir. 1971); *United States v. Baca,* 417 F.2d 103, 105 (10th Cir. 1969). The entire police party here had been in the house area for some time, had seen no lights other than where they were, had heard no noises nor observed any movements, and were specifically aware of the presence of only three persons. Petitioner was certainly under no obligation to talk further to the agents after having received his *Miranda* warnings.

To accept the State's asserted principle that police officers are entitled to make an exploratory search to flush out security risks when no articulable facts furnish probable cause to believe such risks exist would be to engage in the kind of "unconfined analysis" con-

demned in *Chimel* by which "Fourth Amendment protection . . . would approach the evaporation point." 395 U.S. at 765.

Rather, this court adopts the view recently expressed by the Seventh Circuit in *United States v. Gamble,* ..... F.2d....., No. 71-CR-849 (7th Cir. Feb. 12, 1973) that a "protective sweep" to ensure the safety of officers against attack from rooms beyond the site of the arrest violates *Chimel* in the absence of a reasonable belief by such officers that other suspects actually in an area beyond the reach of the arrestee. *Gamble* was even a stronger case than the instant one, for there the arrestee was known to possess firearms and have a tendency towards violence.

Here, the kind of belief found necessary in *Gamble* to warrant a "protective sweep" search does not exist. Accordingly, the search by Verbrugge complained of herein was contrary to constitutional standards as expressed in *Chimel* and the evidence produced by such search should have been suppressed.

Therefore, IT IS ORDERED that the petition for writ of habeas corpus is hereby granted insofar as it relates to the suppression of evidence found in petitioner's house subsequent to his arrest. IT IS FURTHER ORDERED that the matter is remanded to the state trial court in which petitioner was sentenced for reconsideration and redetermination of his sentence based upon the foregoing opinion.

Dated: April 26, 1973

/s/ Geo. B. Harris
United States District Judge

Appendix C

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Crim. 9354
Sup.Ct.No. 43325

People of the State of California,
Plaintiff and Respondent,
vs.
Bob Joseph Enzensperger, Jr.,
Defendant and Appellant.

[Filed Oct. 17, 1972]

OPINION

Following affirmance of defendant's conviction of possession of marijuana by a decision embodied in an unpublished opinion of this court dated May 31, 1972, the Supreme Court granted a hearing and transferred the cause to itself, thereby vacating the decision of this court, and then retransferred the case to this court for reconsideration in the light of Dillon v. Superior Court (1972) 7 Cal.3d 305, 313-314. Since that reference relates only to the right to search for

further suspects, which is the subject of part III of the original opinion, the remaining provisions of that opinion, with the exception of one clause in the preliminary paragraph setting forth this court's conclusions, have been reiterated in this opinion.

Defendant has appealed from "the judgment" (order granting probation) entered on his conviction of possession of marijuana in violation of section 11530 of the Health and Safety Code after a court trial. Imposition of sentence was suspended, and he was placed on probation for a term of five years on conditions, among others, that he pay a fine of $1,000, that he register pursuant to the terms of section 11850 of the Health and Safety Code, and that he submit to searches and narcotic testing when requested by the probation officer. Pursuant to stipulation the matter was submitted on the transcript of the preliminary examination after the defendant had unsuccessfully interposed a motion to dismiss under the provisions of section 995 of the Penal Code, and was also unsuccessful in resisting the People's contention that the search of defendant's premises and seizure of certain contraband was valid when that issue was raised by the People's motion under subdivision (j) of section 1538.5 of the Penal Code.[1]

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[1]The magistrate suppressed all of the evidence seized in the defendant's house except a small quantity of marijuana which had been observed in plain sight on the kitchen table following the officers' entrance. The superior court, division three of this court (1 Civ. 27937) by denying a petition for a writ of prohibition (Pen. Code, § 999a), and the Supreme Court, by denying a petition for hearing, all upheld the action of the magistrate in finding probable cause to hold the defendant to answer for possession of marijuana

Defendant's principal contention is that the officers' illegal entrance into the courtyard of his house vitiated the subsequent consent to entry of the house itself, and in turn tainted the officers' view of marijuana debris which was in plain sight. He urges that therefore there was no basis for his arrest or for the subsequent search of the premises which revealed other marijuana visibly hanging in a closet. He also asserts that in any event the debris in plain sight was too insubstantial to furnish grounds for his arrest, or for the magistrate to hold him to answer, and that even if that arrest were proper there was no reason for the officer to go elsewhere in the house.

A review of the record in the light of applicable rules of law indicates that the officers' respective entries into the courtyard and house were proper; that there was probable cause to arrest the defendant; that a search of the premises for other persons did not fall within the proscription of the rule applied in *Dillon v. Superior Court,* and, in any event, was predicated upon specific articulable facts; that the observation of what was in plain sight was not tainted by an unauthorized search for concealed articles; and that there was sufficient evidence to support the magistrate's finding of probable cause.

About 9 p.m. on September 30, 1969, Investigator Verbrugge of the Santa Cruz district attorney's office,

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in violation of section 11530 of the Penal Code. A second charge of cultivation of marijuana in violation of section 11530.1 had been dismissed by the magistrate.

The superior court on relitigation of the validity of the search and seizure upheld the seizure of certain marijuana hanging in a visible position in an open closet.

received a telephone call from state narcotic agent Elsburg. Elsburg told Verbrugge that he had assisted the Richmond Police Department in arresting two suspects who had several nine foot marijuana plants which they had allegedly secured on Summit Road in Santa Cruz County. He requested Verbrugge to meet him at a designated restaurant on the summit of the highway leading to Santa Cruz.

Verbrugge, his immediate superior, the chief investigator for the district attorney's office, and detective sergeant Marston of the Santa Cruz sheriff's office, later that evening met Elsberg and four or five other state agents, and four members of the Richmond Police Department and the informant, who was in their custody, at the restaurant. There Verbrugge was informed by Elsburg and the Richmond officers that the suspected source was a big house, that the supplier was called Bob, that there were many more marijuana plants in the vicinity of the residence, and that there was a chance Bob might be armed.

The entire party, all of the officers in plain clothes but armed with at least two rifle-type weapons, went to the premises identified by the informant. The majority of the party remained down the road away from the residence which was kept under surveillance. There were lights on in the house and in the courtyard, and no lights went off or on while the house was under surveillance. There were no lights outside the entrance to the courtyard and it was very dark there.

Two state agents were instructed to go up to the door, to attempt to talk to Bob, and to attempt to pur-

chase some marijuana plants from him. Between 11:15 and 11:45 p.m. they went through the door in the fence connecting the two wings of the "U" shaped residence, which is more particularly described below. Verbrugge could not see whether the door was open or closed when they entered or whether they knocked before entering. They apparently knocked on the inner door and awakened a woman who proved to be the defendant's wife. Verbrugge could hear the agents talking to somebody but could not distinguish what was being said. The agents returned after two or three minutes and reported that a woman had told them Bob was not at home, and had provided them with a phone number where he could be reached.

The two state agents went off to make a phone call to the number which had been provided. They returned after about 10 or 15 minutes, and one agent reported that he had called the number given them by defendent's wife, asked for Bob, had a conversation with a male voice and asked him about marijuana plants. The male voice stated that his plants were too small at that time to be sold.

While the officers were discussing this development at some distance from the house, a car with two occupants drove up and parked in the driveway, and the occupants apparently entered the house.

After further discussion, lasting about five or ten minutes, a little after midnight it was decided to "just go take the place." Verbrugge stated that it was decided to go to the house and confront the occupants with the fact that the officers had information that there was marijuana being grown on the property;

and that at that time they did not have the purpose of searching the house. Verbrugge, followed by agent Elsburg and sergeant Marston, approached the house and entered the courtyard through the door in the fence. The other officers remained behind and did not appear until after the defendent's arrest and the search initiated by Verbrugge.

Across the 20-foot courtyard, Verbrugge ascended stairs to what appeared to him to be the main front door to the residence. The drapes were back from a large glass window which adjoined the door and he could see three people seated at a kitchen table right off the living room into which the door opened. The defendant was looking out at the investigator who knocked on the door. The defendant came over, opened the door and the investigator exhibited his badge, gave his name and told the defendant he was an investigator for the Santa Cruz County district attorney's office. When the defendant affirmed that he was "Bob" and the owner of the house, the investigator asked if he could speak to him. The defendant answered yes, and indicated, by holding the door open that the men should come on in. The three men entered and walked over about 15 feet to the kitchen table where the defendant's wife and a young woman were seated. The former was wearing a bathrobe under what appeared to be a nightgown, and the latter was clothed in a sweater and other apparel which Verbrugge could not recall.

The defendant asked the investigator what it was all about, and Verbrugge told him that they had received information that there was marijuana growing

on his property. The investigator asked the defendant if the officers could look around, and the defendant asked him if he had a search warrant. Meanwhile the investigator had observed marijuana debris and cigarette papers on the table among the coffee cups and dishes. He advised the defendant he had no search warrant, but that he was presently under arrest for possession of marijuana. Verbrugge found the defendant was unarmed, but when he walked away from the officers and started swearing at them, he was handcuffed. The investigator gave the defendant a *Miranda* warning. He also placed the women under arrest, and advised them they were entitled to the same rights. The women were not searched at that time as they did not appear to be bearing any weapons. Each identified herself.

Verbrugge asked the defendant if he wished to talk to the officers about the marijuana, and the latter asked the investigator again if he had a search warrant. When the investigator exhibited to defendant some of the green manicured vegetable matter from the table and asked him if it was marijuana, the defendant declined to answer. He also remained silent when asked if there was anything else in the house of a narcotic nature, and when asked if there was anybody else present in the house; nor did either of the women respond to the question of whether there was anybody else in the house.

Verbrugge then ordered sergeant Marston to collect the marijuana debris and he proceeded to do so. The investigator started off through the house to see

if there was anybody else there who might be responsible for the marijuana, or might interfere with the arrest of those already taken into custody. He went through the living room and descended stairs to a bedroom in one of the wings. He turned on the light and looked inside the door. On the wall to his right he observed an open double door closet with a sheet hung up to about the level of his chin. Over the top of the sheet he observed four 9-foot marijuana plants hung up to dry. They appeared to have been recently pulled up from the ground. He turned the plants over to sergeant Marston who had followed him down.[2]

I

Throughout the proceedings the defendant has contended that the door to the courtyard was the entrance to the defendant's residence, and that the officers' entrance through that barrier without knocking or securing permission invalidates all their subsequent observations and acts. If defendant's premise is actually correct, there is merit to his argument.

The officers were fully justified in going to the defendant's house to investigate the report that the de-

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[2]In the bathroom of the master bedroom, in the other wing of the residence, Verbrugge found a shoe box, containing some pipes and some marijuana, in a four-by-five foot cabinet with shelves. Sergeant Marston also found some marijuana in an open coffee can on top of a dresser in the bedroom to which he had been summoned to get the plants. The former evidence was stricken by the magistrate and the latter was never produced by the prosecution. The People's motion, which was granted by the superior court (see fn. 1), was only addressed to the four hanging marijuana plants.

fendant was engaged in the cultivation of marijuana plants.[3]. (See Mann v. Superior Court (1970) 3 Cal.3d 1, 7 [cert.den. (1971) 400 U.S. 1023]; People v. Fein (1971) 4 Cal.3d 747, 752; People v. Edwards (1969) 71 Cal.2d 1096, 1106; People v. Berutko (1969) 71 Cal.2d 84, 90; People v. Mesaris (1970) 14 Cal.App.3d 71, 75; Vickery v. Superior Court (1970) 10 Cal. App.3d 110, 114-115; People v. Willard (1965) 238 Cal.App.2d 292, 307; People v. King (1965) 234 Cal. App.2d 423, 428 [cert.den. (1966) 384 U.S. 1026].) "The constitutional right of privacy of an occupant of a house against police intrusion extends to entries for purposes of investigation as well as to those for purpose of arrest." (People v. Mesaris, supra, 14 Cal. App.3d 71, 75. See also People v. King (1971) 5 Cal. 3d 458, 464, fn. 3, and accompanying text; and People v. Haven (1963) 59 Cal.2d 713, 717.)

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[3]Defendant brought out at the preliminary examination that investigator Verbrugge never himself talked to the informant about the case; that the informant was not summoned to identify the defendant as the person from whom he had received the marijuana plants which were received in Richmond; that before the entry there was no attempt to search the area surrounding the house for marijuana plants; and that there was nothing prior to that entry to corroborate the informant's report other than the fact he pointed out the house. He concludes that Verbrugge and his two companions had no probable cause to arrest the occupants of the house at the time they entered. (See People v. Fein (1971) 4 Cal.3d 747, 752-753.) This analysis fails to consider the information received as a result of the phone call to the number given by defendant's wife. It is unnecessary to consider whether or not there was probable cause for arrest prior to viewing the marijuana debris, because, as is pointed out below, no arrest was made prior to that time, and the entry was effected lawfully. Parenthetically it may be noted that the outside area was searched for plants after the arrest, and apparently some were found.

The entries through the outer door, first by the two state agents,[4] and then by Verbrugge and the two officers with him, did not comply with the provisions of section 844 of the Penal Code.[5] (See Duke v. Superior Court (1969) 1 Cal.3d 314, 318-321; People v. Bradley (1969) 1 Cal.3d 80, 86-89; Greven v. Superior Court (1969) 71 Cal.2d 287, 293-295; People v. Rosales (1968) Cal.2d 299, 302-303; People v. Gastelo (1967) 67 Cal.2d 586, 587-589; People v. Mesaris, supra, 14 Cal.App.3d 71, 76; People v. Hayko (1970) 7 Cal.App.3d 604, 607-608; People v. Perales (1970) 4 Cal.App.3d 773, 778-779; and People v. Douglas (1969) 2 Cal.App.3d 592, 594-595.) "The purposes and policies underlying section 844 are fourfold: (1) the protection of the privacy of the individual in his home [citations]; and (2) the protection of innocent persons who may also be present on the premises where an arrest is made [citation]; (3) the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice [citations]; and (4) the protection of police who might be injured by

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[4]Defendant contends that since the first entry by the two state agents was illegal, the phone number which they obtained and the information received by its use were all poisoned fruit of the illegal entry. He concludes such information could not be used to bolster probable cause for the arrest of the defendant (see fn. 3 above).

[5]Penal Code section 844 provides: "To make an arrest, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

a startled and fearful householder." (Duke v. Superior Court, supra, 1 Cal.3d 314, 321.) All of these considerations apply equally to the unannounced entry of an investigating officer.

It may therefore be concluded that the rules applicable to an entry for the purpose of making an arrest, or to effect service of a search warrant (see Pen. Code, § 1531) are applicable to an entry for the purpose of making an investigation. The fact that the door or gate was unlocked would not of itself excuse the entry. (See Duke v. Superior Court, supra, 1 Cal. 3d at p. 319, fn. 5; People v. Bradley, supra, 1 Cal. 3d at p. 87; People v. Rosales, supra, 68 Cal.2d at p. 303; People v. Hayko, supra, 7 Cal.App.3d at p. 607; and People v. Perales, supra, at p. 779.) It is established that "an entry effected in violation of the provisions of section 844 or its companion section 1531 renders any subsequent search and seizure 'unreasonable' within the meaning of the Fourth Amendment. [Citations.] As a consequence, an unexcused failure to fulfill the knock and notice requirements delineated by section 844 nullifies the subsequent search and requires exclusion of the evidence obtained. [Citations.]" (Duke v. Superior Court, supra, 1 Cal.3d 314, 325, and see cases cited in preceding paragraph.)

Defendant further asserts that since the entry through the outer door was illegal, the subsequent consent to enter the kitchen through the inner door was ineffective. He postulates this conclusion upon the principle that a consent to a search which is obtained after an unlawful entry will not sustain the search.

In *People v. Haven,* supra, the court ruled, "Since the officers' presence in the house was unlawful, they could not rely on defendant's consent to search. Since he was suddenly confronted by five officers who had entered without right or permission, it was equivocal at best whether his apparent consent to being searched was voluntary. The substantial probability that the unlawful entry was essential to securing consent and the inescapable uncertainty whether the consent was voluntary preclude treating the consent as an independent valid basis for the ensuing search of defendant's person." (59 Cal.2d at p. 718.) In *People v. Bradley,* supra, the court held "that the demand and explanation requirements of that section [Pen.Code, § 844] apply, where, as here, officers walk into a dwelling through an open door at nighttime when the occupant apparently is asleep." (1 Cal.3d at p. 87.) It may be significant than even though the aroused occupant was advised of his constitutional rights and replied "No, go ahead" when asked if he minded if a search was made of his house *(id.,* at p. 84), the Attorney General apparently did not try to justify the search on the grounds of consent.

On the other hand if there was reason to believe that the outer portal was merely a garden gate, and that the entrance to the dwelling was on the other side of the courtyard, there was no necessity for going through the demand and explanation at that point. It is clear that there was compliance with all formalities at the inner door, and the evidence is uncontradicted that the defendant ushered the officers in.

Under these circumstances, the observations made by the officers after their entry, and the evidence seized from the kitchen table can properly be used to obtain the defendant's conviction. (See Mann v. Superior Court, supra, 3 Cal.3d 1, 7-9.)

At the preliminary hearing defendant produced photographs of the exterior of the house which reveal the wall and door in question in relation to the two wings of the house, the door itself, and the corner of the open courtyard in which stairs lead up to the inner entrance. From these photographs it appears that the wall connecting the two wings is constructed of siding similar to that enclosing the house; that it is of the height of a door frame; that the roofed wings themselves rise to approximately twice the height of the wall; that the opposite side of the house rises to a height of two stories and has a floor level 9 risers above the level of the entrance and courtyard. The door itself is solid and appears like an ordinary paneled front door. It bears what appears to be a lever-like latch, with a key opening for a lock above the lever. What appears to be a doorbell fixture is separated from the left side of the doorway, which bears the latch, by what appears to be a column similar in size to a power or telephone pole.

The designer of the house, who identified the photographs as picturing it as it existed on September 30, 1969, testified that the fences were an extension of the walls of the bedrooms which were located in each wing; that the courtyard was an "A-trim" (sic, atrium) which, as an interior court, was a design used

by the classical Greeks over two thousand years ago, and has always been considered a part of the house; and that one would have a reasonable expectancy of privacy in such an area because that was its purpose. He further testified that the object to the left of the door was a doorbell; that a light on the exterior of the left wing was placed to provide light to the path leading to the outer door; and that the distance across the courtyard was 20 feet.

Verbrugge in originally describing his entrance to the premises referred to the inner door as "what appeared . . . to be the main front door to the residence." He stated, "It was within the U and in a court like area, it had steps going up to it and had a doorbell." He referred to the outer door as follows: "Just a courtyard, fenced-type door." When asked if it was a gate or door, he replied, "A gate, actually it was a gate." He termed the structure in which the door was placed "the fence that ran the distance . . . between the U-shaped structure." He referred to the outer entrance as a "fenced gate" when describing the first entry by the two state agents. He did not recall seeing any doorbell by the outer entrance. When confronted with the photographs, Verbrugge recognized the house as he recalled it. He acknowledged he could see what appeared to be a doorbell on the photograph of the outer entrance, but commented it was quite dark when he was there. He acknowledged that the photograph portrayed what appeared to be a door, with a latch or knob on it, but could not recall if it was the exact door in existence at the time of his

entry, or if there had been a gate, as he seemed to recall it.

Verbrugge testified that he did not know whether the outer entry was open or closed when the two state agents entered; that he did not know whether they knocked before entering the courtyard; that he believed the outer gate or door swung shut after the agents entered; and that it closed after they left. He acknowledged that no one in his party rang the doorbell, knocked or announced himself when they entered the courtyard later throught the unlocked, but closed, gate or door.

On this evidence the magistrate overruled the defendant's objections to the manner of entry and found that the officers "were, in fact, invited into the house." Similarly, the trial court, in overruling the magistrate's ruling which had suppressed the hanging marijuana, of necessity upheld the entry of Verbrugge and his associates. The evidence does not establish as a matter of law that the entrance to the courtyard was "the door . . . of the house" in the sense in which that term is used in section 844 or in the similar phraseology found in section 1531.

Defendant insists that the requirements of demand and explanation should be governed by developing concepts of areas in which search without a warrant is prohibited. In other words, if the courtyard could not be searched without a warrant, it could not be legally entered if the officers "failed (1) to knock or utilize other means reasonably calculated to give adequate notice of their presence to the occupants, (2) to

identify themselves as police officers, and (3) to explain the purpose of their demand for admittance. [Citations.]" (Duke v. Superior Court, supra, 1 Cal. 3d at p. 319.) The questions, although related, are not necessarily coextensive in scope. For example it may be that an entranceway is held out for the use of those lawfully approaching the premises, yet at the same time the area through which it passes may not be subjected to indiscriminate search. Contrariwise, an area may be closed off to all, and yet by virtue of its location it may be virtually searched from another position of vantage which affords a view. In any event, an examination of the principles and precedents upon which defendant relies does not compel setting aside the finding of the trial court that the unannounced entry through the courtyard was proper.

In People v. Edwards, supra, 71 Cal.2d 1096, the court applied principles enunciated in connection with electronic eavesdropping in Katz v. United States (1967) 389 U.S. 347 to the search of a trash can 2 or 3 feet from the defendant's back porch door. The court stated, ". . . a number of cases involving claims of unconstitutional searches or seizures in open fields or grounds around a house have stated their conclusions in terms of whether the place was a 'constitutionally protected area.' That phrase, however, does not serve as a solution in all cases involving such claims, and we believe that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion. Measured by that test, as we shall see, the

search of the trash can was unlawful under the circumstances here appearing." (71 Cal.2d at p. 1100. See also People v. Krivda (1971) 5 Cal.3d 357, 364 [cert.granted (1972) 31 L.Ed.2d 579]; Pate v. Municipal Court (1970) 11 Cal. App.3d 721, 724; and People v. Douglas, supra, 2 Cal.App.3d 592, 595.)

"The fact that a search may or may not involve a trespass or other invasion of defendant's property interests is not conclusive, for 'The prohibition in the [Fourth] amendment is against unreasonable searches and seizures, not trespasses.' (People v. Terry, supra, 70 Cal.2d 410, 427.) As stated in Katz v. United States, supra, 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected. [Citations.]' (Italics added; 347 U.S. at pp. 351-352 . . .)" (People v. Kirvda, supra, 5 Cal.3d 357, 365 [cert.granted, April 10, 1972]. See also People v. Bradley, supra, 1 Cal.3d 80, 84-86; People v. Edwards, supra, 71 Cal.2d 1096, 1104; People v. Berutko, supra, 71 Cal.2d 84, 91-94; Vickery v. Superior Court, supra, 10 Cal.App.3d 110, 116-120; People v. Willard, supra, 238 Cal.App.2d 292, 298-307; and People v. King, supra, 234 Cal.App.2d 423, 428-432.)

From the latter cases it is clear that there is nothing in the expectation of privacy doctrine which tainted the officers' entry into the courtyard. No indiscriminate search of the courtyard is involved here. In *People v. Bradley,* supra, the court pointed out with re-

spect to the marijuana plants which were observed, "Although they were in a rear yard that was fenced to an undisclosed extent, they were located a scant 20 feet from defendant's door to which presumably delivery men and others came, and the front house, as well as defendant's house, apparently had access to the yard. Under the circumstances it does not appear that defendant exhibited a subjective expectation of privacy as to the plants." (1 Cal.3d at p. 85.)

In *Vickery v. Superior Court,* supra, the court noted, "The fact that the officers in going to the rear of the residence were required to lift the hook latch on the gate of a fence running along the side of the premises seems of little consequence. If in the course of his proper duties as a police officer, that officer is required to make an investigation at a private home, it would seem an unreasonable deterrent to the public's interest in that investigation, that it can be precluded by the mere existence of an unlocked gate." (10 Cal. App.3d at p. 119.)

In *People v. Willard,* supra, the court concluded, "We can find nothing unreasonable in their proceeding to the rear door which appears to have been a normal means of access to and egress from that part of the house. The gate was open and the rear door, actually on the side of the house, would probably be more public than a door at the back of the structure. The sidewalk from the gate to the side porch was further evidence that this area provided a normal access to the house. The structure was a duplex and although the record does not spell it out, it is a reason-

able inference that other occupants of the building had use of the area around it. As stated previously, there were no bushes or hedges and no roof over the porch. It would appear that there was no substantial, if any, degree of privacy to the area." (238 Cal.App. 2d at p. 307.)

In *People v. King,* supra, the court observed, "In the case presently before this court, the trial judge was justified in drawing the inference that the picket fence did not prevent a view from the public sidewalk or adjacent premises of the front yard of the defendant King's residence, or prevent entry into that yard, and that the front yard and the front porch were open for the purpose of use as a means of access by all person having legitimate business with the occupants." (234 Cal.App.2d at p. 432.)

Here the superior court and the magistrate were warranted in finding, as they did, that the unlocked door or gate was, as it appeared to the investigator, a normal means of access to the front door of the house itself. The defendant's subjective "reasonable expectation of privacy" should not control what might appear otherwise to a reasonable man visiting the premises. The fact that the two state agents entered, ostensibly without objection, and were allegedly treated as potential customers, tends to establish that entry through the unlocked courtyard was a normal procedure. As stated in another connection in *Mann v. Superior Court,* supra, "For all they knew or apparently cared, they might have been extending their invitation to an unwelcome acquaintance, a curious parent, an irate

neighbor, or a thief. Consent was quite freely given, and petitioners cannot now complain that those present did not know their callers were police." (3 Cal.3d at p. 8.)

Finally, *Mann v. Superior Court* suggests that even if the entry through the outer door was illegally effected, the entry through the inner door was not an exploitation of that illegality. In *Mann* the occupants' invitation to the officers to come in was found to be independent of the observations which were alleged to have been made as a result of the invasion of the occupants' privacy. (3 Cal.3d at pp. 7-8.) So here, unlike *People v. Haven,* the officers were in an exterior courtyard. They had stopped and knocked and in all respects treated the inner door as the threshhold to the dwelling house itself. There is no showing that there was compulsion, intimidation, or oppressive circumstances other than as engendered by the presence of the officers themselves. The trial court and the magistrate could each properly find that the householder, if so minded, could well have maintained the last rampart, furnished by the inner door, and freely chose not to do so.

No error is found in the implied findings that the officers properly obtained admission to the kitchen area in the course of their investigation.

II

In People v. Leal (1966) 64 Cal.2d 504, a conviction for illegal possession of heroin was reversed. The court concluded, ". . . in penalizing a person who

possesses a narcotic the Legislature proscribed possession of a substance that has a narcotic potential; it condemned the commodity that could be used as such. It did not refer to *useless* traces or residue of such substance. Hence the possession of a minute crystalling residue of narcotic useless for either sale or consumption . . . does not constitute sufficient evidence in itself to sustain a conviction." (64 Cal.2d at p. 512.) The case was remanded to determine whether one-half grain of heroin encrusted on a spoon was usable for sale or consumption. In People v. Fein, supra, 4 Cal.3d 747, the court held that the observation of what appeared to be two burnt marijuana seeds would not furnish probable cause for arrest and a pre-*Chimel* search which turned up other contraband. (4 Cal.3d at pp. 754-756).

Investigator Verbruge testified that before arresting the defendant and his two companions he observed marijuana debris all over the table in different spots, and some cigarette papers; that it appeared to be green manicured marijuana with some seeds, but, to the best of his recollection, no twigs. It was gathered up by Sergeant Marston and later turned over to state agent Elsburg, who in turn delivered the material to a state chemist.

The chemist for the state bureau of narcotic enforcement testified that he received the package, which, with its contents, was an exhibit for indentification and was received in evidence by the court; that it contained one-tenth of a gram of marijuana, of which one-third was used up in testing the substance;

that the one-third consumed consisted of leafy material, and about one-half the remainder, or one-third of the original material, appeared to be from stems; that the leafy material was preferred because it had more resin; that in his experience marijuana cigarettes varied between one-tenth of a gram and one gram in weight; that the average marijuana cigarette was three-tenths of a gram gross weight; and that he considered the amount of marijuana submitted to him as a usable quality because it was one-third of the amount in an average cigarette. He acknowledged that he had never seen samples which had been sold in such quantities; and that if the material had been all stems he would not consider it usable in a cigarette, although stems and seeds, with less resin than the leafy part, were smoked in pipes; and that it would be possible but not be usual to make a one-tenth gram cigarette out of material which was one-third stems.

He also testified that in the absence of other surrounding circumstances it would be difficult to identify the green vegetable matter in the package as marijuana if it were poured out on a table.

Defendant first contends that since the chemist expressed a doubt that the material could be recognized as marijuana when spread out in the manner it was first observed by Verbrugge, the magistrate and trial judge should have rejected the latter's testimony. The credibility of the witness, his expertise as an investigator and the weight to be given his testimony were for the trial court. The judge was entitled to con-

sider, as was Verbrugge, that the premises were reportedly a place where marijuana was being grown; that two of the occupants had conversed with the two state agents when the latter attempted to secure marijuana; and that there were cigarette papers on the table also.

Defendant, through mathematical calculations based on the testimony of the chemist, seeks to establish that his testimony when properly interpreted demonstrates that the quantity examined was not usable as a matter of law because it was only the equivalent of .077 grams of leafy material, below the one-tenth gram of the threshold usability. That analysis overlooks the witness' direct statement that the actual material of the quality examined by him would have been usable in a cigarette or pipe. The magistrate and trial court were entitled to accept his testimony to that effect.

The arrest was made on probable cause. The foregoing conclusion makes it unnecesary to determine whether the admissions made on the telephone, and the viewing of the marijuana debris provided sufficient corroboration of the report of the informer to sustain an arrest for cultivation of marijuana.

III

Defendant, in reliance on Chimel v. California (1969) 395 U.S. 75 asserted in the trial court and on this appeal that the further search of defendant's house after his arrest was improper, and that all evidence seized as a result of that search should have been suppressed. This contention was fully sustained by the magistrate. The trial court in ruling de novo

on the People's motion under subdivision (j) of section 1538.5 of the Penal Code sustained the suppression of the marijuana which was found as the result of searching a cabinet, a shoe box and a coffee can. It refused to suppress the marijuana which agent Verbrugge had observed in plain sight in the closet of a bedroom.

At the time of the trial court's ruling and at the time the case was briefed and argued the parties did not have the benefit of the principles enunciated in People v. Block (1971) 6 Cal.3d 239. The decision in Dillon v. Superior Court, supra, 7 Cal.3d 305 was not filed until one week after the first decision in this case. Following the retransfer of this case, each of the parties was offered, and accepted, an opportunity to and did file with the court his views as to the disposition of the case in the light of the order made by the Supreme Court.

In *Block* the court stated, "It is clear, therefore, that had Officer Galloway been conducting an evidentiary search of defendant's residence, that search would have exceeded the limits prescribed in *Chimel,* for the upstairs area of the house certainly lay beyond the area within the immediate control of the persons arrested in the living and dining rooms. However, one of the 'well-recognized exceptions' referred to in *Chimel,* is one the rule that 'objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. [Citations.]' (Harris v. United States, 390 U.S. 234, 236, other citations omitted.)

"A corollary of the 'plain sight' rule, and one which is pertinent to the instant case, is that 'During a lawful search of premises for persons believed to be in hiding, police officers may seize contraband evidence "in plain sight." [Citations.] Under such circumstances there is, in fact, no search for evidence. [Citations.]' (People v. Marshall, 69 Cal.2d 51, 56, other citations omitted.)" (6 Cal.3d at p. 243. See also Hernandez v. Superior Court (1971) 16 Cal.App.3d 169, 173-174 [disapproved in part People v. Block, supra, 6 Cal.3d 239, 246]; and Guevara v. Superior Court (1970) 7 Cal.App.3d 531, 534-535; and cf. People v. Kampmann (1968) 258 Cal.App.2d 529, at p. 533 with p. 534.

In order to justify the agent's presence in the bedroom where he made the observation of the marijuana in the closet, the prosecution must satisfy the following test, enunciated in *Block* and reaffirmed and applied in *Dillon:* "As a general rule, the reasonableness of an officers' conduct is dependent upon the existence of facts available to him at the moment of the search or seizure which would warrant a man of reasonable caution in the belief that the action taken was appropriate. [Citation.] And in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or 'hunches,' but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary." (6 Cal.3d at p. 244; and see 7 Cal.3d at pp. 312-313.)

This test was considered by the trial court. In his brief submitted to the trial court in support of the ruling which had suppressed all of the evidence except the marijuana fragments found on the kitchen table, defendent wrote, "Verbrugge testified that he was concerned that there might be armed persons in some other part of the house who might frustrate the arrest of defendants. However, he did not have any facts which would lead a reasonable man to entertain a suspicion that there were other persons armed or otherwise in the house."[6]

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[6]His argument on this point read as follows: "Regardless of the legality of the entry, the search that uncovered the plants in the bedroom and the coffee can is illegal. *Chimel v. California*, decided by United States Supreme Court on June 23, 1969. The officers testified that they searched the house for other possible suspects and not contraband. Verbrugge testified that he was concerned that there might be armed persons in some other part of the house who might frustrate the arrest of defendants. However, he did not have any facts which would lead a reasonable man to entertain a suspicion that there were other persons armed or otherwise in the house. The attempt to base the wholesale search of the house on Verbrugge's information that someone might be armed is fraught with the same problems as an attempt to justify the entry. *People v. Adkins*, supra; *People v. Harrington*, supra; *People v. Adam*, supra. Furthermore, it is difficult to believe that Verbrugge looked in the bathroom cabinet or the shoe box for a person or that Marston looked in the coffee can for a person. Not only is there no reasonable relationship between such a search and its avowed purpose, *People v. Ramsey*, 272 A.C.A.2d 356, but it gives rise to a reasonable inference that the officer was not entirely candid in his testimony that he went to the bedroom only to look for other possible suspects. This is especially so since he could state no facts that might have led a reasonable person to believe there were others in the house. The officers had been on the premises for some time. No lights were on other than where the officers were; no noises were heard; no movements noted. Two agents had interviewed Mrs. Enzensperger who at that time appeared to be asleep and the only person in the house. Certainly the fact that a house is large does not justify this search without a warrant."

The district attorney recognized that it was necessary to show that it was reasonable for Verbrugge to inspect the residence to see if other persons were present. He referred to the following facts which the attorney general now relies upon to support the ruling of the trial court:

"1. In addition to his information that narcotics had been obtained from and were at the residence, he had information from fellow officers that someone might be armed.

"2. When arrested, Bob moved as if to walk away from Verbrugge and resist arrest. He would not sit down when asked to do so, swore at the officers and had to be handcuffed.

"3. After arresting defendants and prior to inspecting the premises, Verbrugge specifically asked whether there was anyone else in the house. No one responded.

"4. Verbrugge had no way of knowing whether there was anyone else in the residence. Before going to the front door he knew at least one female and the two persons who drove up in the car were there. He did not know whether the three persons he subsequently arrested were those same persons.

"The combination of these factors were sufficient to lead a reasonable man in Verbrugge's position to conclude that a precautionary inspection of the premises for armed persons was necessary for his protection and the protection of fellow officers. It is common knowledge among law enforcement officers that many persons who furnish and possess narcotics arm them-

selves with weapons and are dangerous. The conduct of defendants when arrested gave significance to the information that someone might be armed. It was reasonable for Verbrugge to suspect that Bob might be relying on others in the residence for assistance because of Bob's attitude and attempt to walk away from arrest, an act so obviously futile with three officers present. It was reasonable for Verbrugge to interpret the lack of response from defendants when asked if there was anyone else present in the house, as an evasive effort to conceal someone's presence. It was reasonable for Verbrugge to suspect that the party who returned to the residence with Bob was at liberty in the house."

In *Block* the court upheld Guevara v. Superior Court, supra, 7 Cal.App.3d 531, because the officer had "information as to other persons which it was their right, and their duty, to follow up." (7 Cal.App.3d at p. 535, and see 6 Cal.3d at p. 246) In *Black* the court analyzed the facts as follows:

"In the instant case, it seems evident that Officer Galloway had reasonable cause to believe, based upon facts available to him at the time he acted, that additional persons might be on the premises. The presence of six or seven persons downstairs, four of whom bore signs of recent marijuana use, together with the immediate detection of burning marijuana smoke and the discovery of a smoking marijuana roach and two pipes lying in plain sight on a coffee table reasonably indicated that a 'pot party' was in progress, involving an undetermined number of participants. The lights which illuminated the stairway and upstairs hall justi-

fied the further suspicion that other persons might be upstairs who were involved in the offenses charged, or who might pose a security risk for the arresting officers. Under these circumstances, it was entirely reasonable for Officer Galloway to act as he did." (6 Cal.3d at p. 245, fn. omitted.)

On the other hand, in *Dillon,* the author, who had dissented in *Block,* refers to it [*Block*] as a close case as to whether probable cause existed to search for further suspects. In *Dillon,* the suspect was arrested in her backyard. (*Cf.* Vale v. Louisiana (1970) 399 U.S. 30, 33-34.) She and the officers went into the house only because she requested permission to make a phone call. She made the phone call from the living room located just inside the front door which they had entered. "None of the officers testified that he was in fear of his life or safety. The detective in charge admitted that he had no specific articulable information that any suspects were in the house at that moment; only general information that two other persons had been living at the house. There was no one else beside petitioner in the house at the time." (7 Cal.3d at p. 313.) The court concluded, "By holding the mere possibility that there might be an additional unknown person or persons in the house warrants a search of the entire premises the court would render the rule of *Chimel* largely meaningless. [¶] We have concluded that the mere fact that the marijuana plants were found in the backyard and that two others had been living at the house, without additional facts, does not furnish probable cause to believe that others may be present in the house. The contraband found in the

house as a result of the search is inadmissible." (*Id.* at p. 314, fn. omitted.)

The first statement in the conclusion is an overexaggeration. There is a vast difference between an inspection of the premises for other persons who might be involved in the offense charged or who might pose a security risk for the arresting officers, which leads to the discovery of what is in plain sight and the general rummaging around which is proscribed in *Chimel.* This distinction was observed by the trial judge who upheld the suppression of the evidence turned up by the officers' subsequent search. It is sustained by common sense.

In the first place it should be noted that in *Chimel* and *Vale* the arrests involved were under warrants issued for offenses which were allegedly committed at another time, and at least in the case of *Chimel,* at another place. Under such circumstances, if there is reason to suspect a confederate, a warrant should be obtained for his arrest. If there is reason to suspect the presence of contraband, the fruits or instruments of the prior offense, a search warrant should be secured. In the instant case, the probable cause for arrest arose in the course of the investigation and the offense was one committed on the premises in the presence of the officers. It is not necessary to determine whether *Chimel* may be so distinguished, and whether it is reasonable to search the premises under such circumstances.[7] It suffices to note that in *Dillon,*

[7]In Hernandez v. Superior Court (1971) 16 Cal.App.3d 169, the court stated, "A careful reading of *Chimel* shows that it is meant to protect a person who is arrested at his home from of-

although there was no warrant, the criminal acts for which the petitioner was arrested occurred and were observed outside the premises. Given the offense committed within the house, it was reasonable to at least make sure that there were no other confederates. In *Vale v. Louisiana,* supra, the court noted that the search of the premises without first securing a search warrant could not be justified on the theory prepounded by the state court, that someone might destroy other evidence in the meantime. The Supreme Court pointed out, "Such a rationale could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises." (399 U.S. at p. 34.) So here the trial court was entitled to find that the inspection for other persons was reasonable even though a search warrant would be necessary before a thorough search could be made. This case evidences that such an inspection may be

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fensive search which goes beyond the necessities of the case, which usually are no more than those of the arrest itself. It was not meant, we are convinced, to protect persons in possession of contraband or the contraband within a house when evidence of its presence is shown at the moment of the arrest." (16 Cal.App.3d at p. 174.)

In People v. Block, supra, 6 Cal.3d 239, the court, after appraising a case upholding a search for a known confederate, but without attempting to note the distinction between Hernandez' arrest on a warrant, and his second arrest attendant to his commission of a further offense on the premises which was witnessed by the officers, stated, "On the other hand, compare *Hernandez v. Superior Court,* 16 Cal.App.3d 169, 173-174 [93 Cal.Rptr. 816], wherein the court appears to sanction a 'general looking for persons' of the sort condemned under our analysis of Fourth Amendment requirements. In *Hernandez,* the recited facts did not indicate a reasonable likelihood that additional persons were present in the house who might be participants in the offense. To the extent inconsistent with our opinion, *Hernandez* is disapproved." (6 Cal.3d at p. 246, fn. 6.)

overextended into a prohibited search, but it also demonstrates that both magistrate and trial judge meticulously precluded the arresting officers from profiting from their overzealousness by excluding the fruits of such searching.

Secondly there is some danger in requiring that articulable facts be sensed before a search may be made for persons. If the first articulable fact is a bullet it may be too late to look for the confederate. In *Guevara* the court noted that the contention that the officer was entitled to enter another room in order to assure himself that he would not be attacked by someone hiding there was "no more than the ingenious imagination of counsel for the People." (7 Cal.App. 3d at p. 535.) In this case, however, the officer testified that he was attempting to ascertain if there were other persons in the house who might be responsible for some of the marijuana or who might attempt to free the prisoners from the officers as they went out. He also testified that he had been told that someone at the residence might be armed. The magistrate found that the further search could not be justified because although the informant indicated the occupant Bob was armed, once that occupant was arrested and in handcuffs he could no longer present a danger to the officers. The trial court, however, on hearing the matter *de novo* (See Pen. Code, §1538.5, rule (j)) apparently rejected that conclusion and upheld the walk-through.

In balancing the rules the latter rule appears proper. Under the circumstances of this case it is neces-

sary to balance the rights of those accused and found red-handed in possession of contraband within the premises, with the interest of society in supressing contraband, and protecting its officers. A rule which requires a search warrant before a search may be made of wider scope than that permitted in *Chimel* gives the accused committing an offense on the premises more than his due. The protection of evidence, pending obtaining of a search warrant, and the safety of the officers dictate that an inspection of the premises used for the criminal offense is reasonable and should not be prohibited on constitutional principles. A rule prohibiting the officers from so acting to insure their safety and the maintenance of the status quo will certainly not alter such conduct. Self-protection will dictate continuance of the practice. At best the rule can but furnish a passport to freedom from aggravation of other charges upon which the inspection was predicated, when the inspection reveals, as it did here, other contraband in plain sight. Nor does the admission of the evidence of the contraband observed in plain sight implicate the courts in a "dirty business" under the circumstances of this case. The inspection for persons on premises in which a criminal activity is observed is only a "dirty business" after, and not before, such an inspection is declared unconstitutional.

It is concluded that the principles referred to in *Dillon v. Superior Court,* supra, do not proscribe the inspection for persons which was conducted under the circumstances of this case, and that in any event,

there is evidence of articulable circumstances which sustained the trial court's implied findings that the officer was lawfully in that portion of the premises where he observed the contraband in plain sight. There was no error in refusing to suppress that contraband.[8]

The judgment is affirmed.

Sims, J.

We Concur:
Molinari, P. J.
Elkington, J.

[8]Since there was evidence of possession of marijuana in a useable amount on the kitchen table (see part II above) the order to reconsider the case in the light of *Dillon v. Superior Court* may be an exercise in futility. Even if the trial court had excluded the marijuana hanging in the closet, it may well have convicted the defendant for possession of the former. The principal issue herein was the entry discussed in part I of the opinion.